JAAFAR SHAARI & ANOR.

v.

TAN LIP ENG & ANOR.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 12-27-88]
9 APRIL 1992

TORT: *Appeal against decision of Sessions Court - Plaintiff's claim dismissed - Defendants elected not to call for defence - Whether plaintiffs can rely on 1st defendant's police report to prove case - Police report in part 2 agreed bundle of documents - Sections 32, 73A of Evidence Act 1950 - Sketch plan - Reliance on doctrine of res ipsa loquitur.*

The plaintiffs claim for damages arising out of a fatal road accident was dismissed by the Sessions Court after the plaintiffs closed their case and the defence elected not to call for any evidence. No eyewitness testified on behalf of the plaintiffs as to how the accident occurred and the sketch plan offered no help either as to the manner of the accident. There was however a police report made by the 1st defendant about the accident which was included in the agreed bundle of documents Part 2. However after the plaintiffs closed their case the defence did not call for any evidence.

The plaintiffs argued that they were entitled to rely on the said report to prove their case under ss. 32 and 73A of the Evidence Act 1950 as defence Counsel had admitted that the 1st defendant was overseas and was expected to be away for two years. The plaintiffs also relied on *res ipsa loquitur* that from the sketch plan there was evidence to conclude that the defendants were negligent.

Held:

[1] As the 1st defendant's police report was in Part 2 of the Agreed Bundle which means the contents need to be proved and the defendants had not called any evidence, the plaintiffs could not rely on it.

[2] Before the plaintiffs can rely on s. 32 or s. 73A of the Evidence Act 1950, the plaintiffs must prove that it was a first information report for it to be admissible. Here the plaintiffs have failed to do so.

[3] The plaintiffs must adduce evidence to rely on s. 32(3) Evidence Act 1950 to show that the 1st defendant's attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable. The defence Counsel's word after the plaintiffs had closed their case that the 1st defendant was overseas and was expected to be away for 2 years did not constitute evidence nor did it form part of plaintiffs' case to show that the 1st defendant could not be procured without an amount of delay or expense.

[4] The doctrine of *res ipsa loquitur* does not apply in this case. The mere showing of a motorcycle lying near the centre double white line on the road in the sketch plan was not necessarily more consistent with the negligence on the part of the 1st defendant than with other causes.

[5] As no evidence was adduced to show how the accident took place, the plaintiffs have failed to prove their case and the Sessions Court was right in dismissing the claim of the plaintiffs.

[Decision of the Sessions Court upheld. Plaintiffs appeal dismissed with costs.]

Cases referred to:
M.A. Clyde v. Wong Ah Mei & Anor. [1970] 2 MLJ 183 ***(cit)***
Martin Rhienus v. Sher Singh [1949] MLJ 201 ***(cit)***
Noor Haiyati Bte. Saad & Anor. v. Said B. Ismail [1991] 3 CLJ (Rep) 351 ***(cit)***
Ng Chui Sia v. Maimon Bte. Ali [1983] 1 MLJ 110 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 32, 73A, (2), 114 illus.(g)

For the appellant - Padma; M/s. Sykt. Baldev Bhar
For the respondent - Ernest G. Theseira; M/s. V.P. Nathan & Partners

JUDGMENT

KC Vohrah J:

This is an appeal against the decision of the learned Judge of the Sessions Court Alor Setar who dismissed the claim of the plaintiffs after the plaintiffs closed their case and the defendant elected not to call any evidence.

One Shofiah bte Ahmad died in an accident which took place on 25 March 1984 along the Alor Setar - Sungei Petani road. The administrator of her estate brought a claim against the rider of a motor cycle (the 1st defendant) and the registered owner of the motor cycle (the 2nd defendant).

Paragraph 3 of the statement of claim states that Shofiah bte Ahmad was standing at the centre broken white line along the Alor Setar - Sungei Petani road on the right hand side of the road as one faces Sungei Petani when she was collided into by motor cycle No. KQ 7364 ridden by the 1st defendant. And para. 4 alleges that the said collision was caused by the 1st defendant and the particulars of negligence were set out.

The defendant in their statement of defence admitted that a collision took place at the date and time pleaded but they denied all the other allegations contained in paras. 3 and 4 of the statement of claim.

No eyewitness testified on behalf of the plaintiff as to the manner in which the accident took place. A certified true copy of a sketch plan which Acting Sergeant Baharom (PW4) testified he drew as investigating officer of the case merely showed a motor cycle lying beside the double white line in the centre of the road but it offered no help as to the manner in which the accident took place.

There was another document, a report made by the 1st defendant to the police about the accident. It is a document included in Part II of the Agreed Bundle which means the contents had to be proved. As it turned out when the plaintiffs closed their case Counsel for the defendants did not call any evidence.

The plaintiffs insisted that their case had been proved because they could rely on the said police report and its contents. The learned Judge ruled it was inadmissible and relied on the decision of Edgar Joseph Jr. J (as he then was) in *Chuah Ah Chee & 2 Ors. v. Guardial Singh, Penang High Court Civil Suit No. 351 of 1979*, which was affirmed by the Supreme Court, that, *inter alia*, even though the police report of the defendant (who had died before the trial) had been included for the purpose of corroborating or contradicting his oral evidence and not as substitute for it and it was subject to proof of contents.

It was argued before the Court below and before me that the police report was admissible under ss. 32 or 73A of the Evidence Act 1950 as the defendants' Counsel had admitted that 1st defendant was overseas and was expected to be away for 2 years.

Before the plaintiffs can rely on s. 32 or 73A of the Evidence Act they would have to show that the report was a first information report in which case it would be admissible (see *M.A. Clyde v. Wong Ah Mei & Anor.* [1970] 2 MLJ 183) and not a report made in the course of police investigation in which case it would not be admissible (see *Martin Rhienus v. Sher Singh* [1949] MLJ 201; *Noor Haiyati bte. Saad & Anor. v. Said bin Ismail* [1991] 3 CLJ (Rep) 351). The plaintiffs did not show that the report was a first information report either to the Court below or to me.

Secondly the plaintiffs have to adduce evidence if they wish to rely on s. 32(3) (that is that the statement would have exposed the maker to a suit for damages) that the "maker's attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appear to the Court unreasonable". Suffice it to say the plaintiffs did not adduce such evidence. They merely relied on a statement of the defendants' Counsel to the Court after the plaintiffs had closed their case that the 1st defendant was overseas and was expected to be away for 2 years. This statement made after the plaintiffs closed their case did not constitute evidence nor formed part of the plaintiffs' case to show that the attendance of the 1st defendant "could not be procured without an amount of delay or expense".

As for the plaintiffs reliance on s. 73A the plaintiffs would have needed to adduce evidence under subsection (2) thereof to satisfy the Court below that "having regard to all circumstances of the case undue delay or expense would otherwise be caused" before the statement could be made admissible. Again this was not done.

Two other matters were also raised. One related to s. 114(g) of the Evidence Act in regard to the absence of the 1st defendant at the trial in the Sessions Court but this ground was abandoned before me. The other matter was in regard to their reliance on *res ipsa loquitur*. Counsel for the plaintiffs argued that from the sketch plan there was available evidence to conclude that the 1st defendant was negligent. The learned Judge below rejected the application of the maxim. The mere showing of a motor cycle lying near the centre double white line on the road in the sketch plan is not necessarily more consistent with negligence on the part of the first defendant than with other causes. The learned Judge was right in stating that this particular rule of evidence did not apply in this case.

To come back to the case of the plaintiffs and to the evidence they adduced in the case - no evidence was adduced to show how the accident took place involving Shofiah and the 1st defendant. In short the plaintiffs had not proved their case and one is reminded of the words of Hashim Yeop A Sani J (as he then was) in *Ng Chui Sia v. Maimon bte. Ali* [1983] 1 MLJ 110:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. The plaintiff must show affirmatively that there has been a breach of a specific or general duty by the defendant and this resulted in the damages to the plaintiff. If he fails to prove the action the action must fail.

There being no evidence to support the allegation of the plaintiffs that the 1st defendant was negligent the Judge was right in dismissing the claim of the plaintiffs. The appeal is therefore dismissed with costs.

Also found at [1992] 3 CLJ 1600